SUMITA DEVELOPMENT (M) SDN BHD A

v.

MAJLIS PERBANDARAN PULAU PINANG & ANOR

HIGH COURT MALAYA, PULAU PINANG B
S NANTHA BALAN JC
[CIVIL SUIT NO: 25-27-05-2013]
2 JULY 2014

ADMINISTRATIVE LAW: *Remedies - Judicial review - Application for amendment of claims - Whether to be made in Form 109 or Form 110 - Whether impugned decision properly identified - Delay in filing application - Whether application for leave or extension of time made - Whether court had jurisdiction to hear application - Whether amendment allowed - Rules of Court 2012, O. 53 rr. 3(1) & (7)* C D

The applicant had successfully obtained planning permission for a development and had also obtained approval for building plans. However, the applicant was unable to proceed with the development as their application for approval for commencement of work ('COW') had been put on hold due to a dispute pertaining to ownership of the land. The applicant made several queries with the first respondent who was the planning authority but to no avail. In the meantime, the first respondent had referred the matter to the State Planning Committee ('SPC') for consideration and SPC recommended that the so-called appeal over the COW be rejected. The first respondent, by a letter which was copied to the applicant, informed the Ministry of Local Government and Housing that on 4 May 2013, SPC had recommended that the appeal in respect of the COW be rejected. Thereafter, on 14 May 2013, the first respondent rejected the applicant's application for COW, extension of the planning permission and approval for earthworks plan. The applicant therefore filed an application for judicial review under O. 53 of the Rules of Court 2012 ('ROC') and the target of the application for leave was the so-called 'decision' of the SPC dated 4 May 2013. The first respondent raised a preliminary objection that leave was granted in respect of SPC's decision, which was only a recommendation and was, in any event, not a decision of the first respondent which was the planning authority, and as such, the wrong decision had been challenged. The applicant subsequently filed an application to amend pertaining to amendment to Form 110 ('encl. 31'). However, the first respondent contended that the applicant's attempt to amend E F G H I

A Form 110 was flawed and fatal as the relief sought for the purposes of judicial review are to be stated in Form 109 and not Form 110 which only sets out the hearing date for the substantive hearing of the application for judicial review. The first respondent also argued that leave to challenge the first respondent's decision
B must be made within three months from the date when it was communicated. As the period for the challenge had expired, the applicant ought to either file fresh proceedings for judicial review or file an application for extension of time pursuant to O. 53 r. 3(7) of the ROC.

C

Held (dismissing encl. 31):

(1) In judicial review proceedings, it is absolutely imperative and axiomatic that the impugned decision be properly identified and specifically stated in the application for leave. If the
D judicial review application is taken against the wrong authority or the wrong decision, then invariably the judicial review becomes incompetent. In the present case, the lawful authority for purposes of planning under the Town and Country Planning Act 1976 ('the Act') was the first respondent and
E not SPC. (paras 47 & 49)

(2) Leave under O. 53 r. 3(1) of the ROC was granted on 26 June 2013 for judicial review to challenge SPC's recommendation dated 4 March 2013. Before the leave
F application came up for hearing, the applicant was already in receipt on the first respondent's decision dated 14 May 2013 confirming that there was no approval for COW and that there would be no extension to the planning permission. Despite being informed that the application to extend planning
G permission had been refused, the applicant did not apply for leave to challenge the decision dated 14 May 2013. Leave was therefore granted only in respect of SPC's recommendation pertaining to the issue of COW. (paras 45 & 46)

H **(3)** SPC's recommendation was not the decision which should be reviewed because it was not a decision made under the auspices of the Act and it was only an administrative decision by an organ of the state authority which had no legal effect in so far as the Act is concerned. In the context of the
I present case, it was the first respondent's decision of 14 May 2013 that was imperative for purposes of a challenge in judicial review proceedings. (para 51)

(4) There was no application for leave or extension of time in respect of the first respondent's decision. The failure to obtain the leave went to the jurisdiction of the court to hear the applicant's application for judicial review and cannot be established where it is absent by consent or acquiescence. (paras 52 & 55)

(5) The application for amendment in encl. 31 served no purpose as it did not seek to amend Form 109 nor did it seek leave or extension of time *vis-à-vis* the impugned decision of the first respondent. Therefore, encl. 31 did not cure the situation, in that, leave was only in respect of SPC's recommendation which was or might be the precursor to the first respondent's decision. (paras 53 & 57)

(6) Prior to the leave application, the applicant was aware of the first respondent's decision dated 14 May 2013 and could have amended the application for leave and rectified the error and properly pleaded the decision which should be challenged. But that was not done. Even after the preliminary objection was raised by the first respondent, the applicant made no attempt to amend Form 109 and the order for leave coupled with an extension of time. In the circumstances, the court could not arrogate itself jurisdiction to review the first respondent's decision. The encl. 31, therefore, would serve no purpose and the principle is that wherever an amendment has no utility then the amendment will be declined. (paras 58 & 59)

Case(s) referred to:

Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor [2008] 6 CLJ 805 CA ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

Mersing Omnibus Co Sdn Bhd v. The Minister of Labour & Manpower & Anor [1983] 2 CLJ 7; [1983] CLJ (Rep) 266 FC ***(refd)***

Omar Suhaimi Abu Hassan v. Mahkamah Perusahaan Malaysia & Anor [2014] 3 CLJ 720 CA ***(refd)***

Ponnusamy & Anor v. Nathu Ram [1959] 1 LNS 73 HC ***(refd)***

Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor [2013] 4 CLJ 193 FC ***(refd)***

Yick Hoe Ferrous Steel Sdn Bhd v. Tribunal Rayuan Kastam & Ors [2011] 7 CLJ 544 HC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 53 rr. 3(1), (2), (6), (7)
Rules of the High Court 1980, O. 1A, O. 53
Town and Country Planning Act 1976, s. 20

For the applicant - Surinder Singh; M/s Ong & Manecksha
For 1st defendant - Dominic Pillai; M/s Presgrave & Matthews
For 2nd defendant - Nurul Atiqah Azizan; State Legal Adviser, Pulau Pinang

Reported by S Barathi

JUDGMENT

S Nantha Balan JC:

Introduction

[1] These are my grounds in respect of an application for amendment (encl. 31) that arose in the course of judicial review proceedings. The issue that arises for consideration in this application is whether after leave to apply for judicial review had been granted in respect of a recommendation/decision by the second respondent (State Planning Committee), an application for amendment of, *inter alia*, Form 110 may be allowed after the expiry of the period of three months to make reference to decisions made by the first respondent (planning authority) which were not the subject matter of the leave that was granted.

[2] The instant application for amendment was made by the applicant during the hearing of the substantive application for judicial review, that is, after leave had been granted and I may add, at the tail end of the proceedings when the court had heard the first respondent's preliminary objection to the judicial review. As a result of the preliminary objection, the substantive merits of the judicial review application was kept in abeyance pending disposal of the issues raised by way of the preliminary objection. The preliminary objection was based on the first respondent's argument that the applicant had not identified the proper decision for purposes of leave. And so it was argued that leave had been granted in respect of the wrong decision.

[3] The background to the judicial review application, the preliminary objection and the application for amendment may be gleaned from the following chronology of events.

Chronology Of Events

	Date	Event
(1)	12 December 2005	First respondent approved planning permission in favour of the applicant by way of approval No. JPB/KM/3277/A (subject to conditions).
(2)	12 July 2007	Building Plan No. 44251 was approved (based on Planning Permission No. JPB/KM/3277/A).
(3)	27 June 2008	First respondent approved the commencement of work ("COW") (in respect of Planning Permission No. JPB/KM/3277/A).
(4)	19 November 2009	First respondent's building department's inspection of site revealed that work had not commenced. Therefore all approved plans lapsed.
(5)	9 July 2010	Applicant filed fresh application for planning permission in respect of a proposal to construct seven units of three storey terrace houses and six units of three storey semi detached houses on Lot 83 & 84, North East District, Jalan Faraday, Bandar Jelutong, Pulau Pinang ("the proposed development").
(6)	22 March 2011	The proposed development is approved subject to conditions as per Planning Permission No. JPB/KM/4357/A.
(7)	14 December 2011	First respondent approved the Building Plan No. MPPP/OSC/PB (3817)/11.
(8)	30 August 2012	Letter issued by Commercial Criminal Investigation Department Penang informing the first respondent that the police are investigating the directors of the applicant in respect of the approval

		of the proposed development and requested documents relating to the approval from the first respondent.
(9)	31 December 2012	Registrar's caveat entered in respect of the said land.
(10)	Oct-Nov 2012	First respondent's building department freezes applications by the applicant regarding COW, permit for perimeter fencing & extension of the building plan on the basis of the dispute regarding ownership of land.
(11)	29 November 2012	Applicant's architect wrote to the first respondent and complains about the building department's refusal to accept applications relating to the proposed development.
(12)	6 December 2012	Applicant's architect writes a reminder to the first respondent's building department and informs that Building Plan No. MPPP/OSC/PB (3817)/11 will expire on 13 December 2012.
(13)	30 January 2013	The first respondent received an application from the Sri Veeramakaliamman Temple requesting the first respondent to cancel the approval given to the applicant in respect of the proposed development wherein the temple committee members claimed to be beneficiaries of the land on which the proposed development is to be carried out and alleged wrong doings on the part of Subramaniam a/l Muthusamy & Lalidah a/p Sinnasamy (ie, the registered proprietors of the said land).
(14)		The applicant lodged a complaint with the Ministry of Housing and Local Government. In the meanwhile, the first respondent referred the applicant's application for COW to the State

Planning Committee ("SPC") for consideration. SPC treated the matter as an "appeal".

(15) 4 March 2013 — SPC recommended that the appeal in respect of COW be rejected. This was conveyed to the first respondent. The recommendation of the SPC as communicated to the first respondent by way of letter dated 12 March 2013 is as follows:

> 1. Dimaklumkan bahawa Mesyuarat Jawatankuasa Perancang Negeri Bil. 3/2013 pada 4 Mac 2013 memperakukan untuk menolak permohonan ini dan mengesahkan pada hari yang sama.
>
> Keputusan perkara (2) di atas dengan ini disampaikan kepada pentadbiran Y. Bhg. Dato' selaku pihak berkuasa perancang tempatan untuk tindakan sewajarnya.

(16) 11 April 2013 — In response to the complaint lodged by the applicant, the Ministry of Housing and Local Government wrote to the first respondent and sought an explanation in respect of the proposed development.

(17) 2 May 2013 — The first respondent responded to the Ministry of Housing and Local Government's enquiry informing that the matter had been referred to the SPC and that on 4 March 2013 the SPC had "memperaku" or "recommended" that the appeal in respect of the COW be rejected.

The first respondent's letter to the Ministry was copied to the applicant. The applicant thereby became aware of the decision taken by the SPC on 4 March 2013.

(18)	14 May 2013	The first respondent decided to reject: the applicant's application to extend the planning permission; the applicant's application for COW; the applicant's application in respect of earthworks plan.
(19)	14 May 2013	The first respondent informed the applicant's consultant that its application for earthworks plan was rejected as the earthworks plan did not comply with the conditions imposed and that it was out of the 80 days time frame imposed.
(20)	15 May 2013	The first respondent informed the applicant that on 14 May 2013 the applicant's application for COW for the proposed development had been rejected.
(21)	13 June 2013	The first respondent wrote to the applicant informing it that its application for extension of Planning Permission No. PB/KM/4387/A was rejected on 14 May 2013 as there is a dispute as to the beneficial ownership of the land on which the proposed development is to be carried out.

[4] In a nutshell, the events leading up to the filing of the application for leave are that the applicant had successfully obtained planning permission for a development and had also obtained approval for building plans but later found themselves unable to proceed with the development as their application for approval for commencement of work ("COW") had been put in cold storage as there was apparently a dispute pertaining to ownership of the land.

[5] Without the COW approval, the project could not take off. The applicant made several queries with the first respondent who was the planning authority, but to no avail. Their queries fell on deaf ears. Being frustrated, the applicant lodged a complaint with the Ministry of Local Government and Housing.

[6] In the meanwhile, the first respondent had apparently escalated or referred the matter to SPC for consideration. SPC dealt with the matter as an appeal although the applicant never made an appeal to the first respondent or the SPC but was merely pushing for the COW to be approved. In any case, on 4 March 2013 SPC recommended that the so-called appeal over the COW be rejected.

[7] Thereafter, the Ministry of Local Government and Housing acted on the applicant's complaint and asked the first respondent to render an explanation with respect to the complaint lodged by the applicant. By letter dated 2 May 2013, the first respondent informed the Ministry of Local Government and Housing that on 4 March 2013 SPC had recommended that the appeal in respect of the COW be rejected. That letter was copied to the applicant. Thereafter, on 14 May 2013 the first respondent rejected the applicant's application for COW, extension of the planning permission and approval for earthworks plan.

[8] The applicant then filed the relevant cause papers for an application for judicial review under O. 53 of the Rules of Court 2012 and the target of the application for leave was the so-called "decision" of the SPC dated 4 March 2013. Procedurally, the first step for the judicial review application was for the applicant to obtain leave. It is material to note that the first respondent's decisions taken on 14 May 2013 had all been duly communicated in writing to the applicant before the hearing of the application for leave.

[9] The application for leave was heard on 26 June 2013. The papers filed in respect of the application for leave were Form 109 (containing the prayer for leave and all the substantive reliefs that were being sought in the judicial review application), the statement pursuant to O. 53 r. 3(2) of the Rules of Court 2012 and the affidavit verifying the facts stated in the statement.

[10] After leave was obtained, the applicant filed Form 110, which serves the purpose of notifying parties of the hearing date for judicial review. Procedurally, the reliefs sought in the judicial review are all to be stated in Form 109 and not in Form 110.

[11] In this case, the applicant filed their application for leave to apply for judicial review and obtained leave on 26 June 2013. The order granting leave (encl. 6) reads as follows:

A (1) Suatu pendengaran Kajian Kehakiman supaya **keputusan Responden Pertama Kedua** dalam satu mesyuarat Majlis bertarikh 4 Mac 2013 dibatalkan.

(2) Suatu Pendengaran *Mandamus* supaya Pemohon dibenarkan untuk meneruskan kerja untuk Cadangan Mendirikan 7 Unit
B Rumah Teres 3 Tingkat dan 6 Unit Rumah Berkembar 3 Tingkat di atas Lot 83 dan 84, Daerah Timur Laut, Jalan Faraday, Bandar Jelutong, Pulau Pinang. (emphasis added)

[12] It is not in dispute that before the application for leave was
C heard the applicant was already in receipt of the decision of the first respondent rejecting:

(i) The applicant's application to extend the planning permission;

(ii) The applicant's application for COW;

D

(iii) The applicant's application in respect of earthworks plan.

[13] It is material to note that leave was granted in respect of the so-called decision dated 4 March 2013 and the order granting
E leave states that it is the decision of the first and second respondents. But, in law and in fact, the so-called decision of 4 March 2013 is that of the SPC which is an authority or department under the jurisdiction of the second respondent. The decision taken on 4 March 2013 is not that of the first
F respondent. Also, there was considerable debate as to whether the so-called decision of 4 March 2013 was truly a decision or a recommendation. But for reasons which will be apparent from this judgment, that distinction is unimportant and irrelevant.

[14] It is not in dispute that the SPC is not the planning
G authority for purposes of planning under the Town and Country Planning Act 1976. Rather, the lawful planning authority under the Town and Country Planning Act 1976 is the first respondent. The order for leave was in respect of a so-called decision that was made by the SPC on 4 March 2013 and not in respect of any
H decision made by the first respondent. And so although the order for leave implicates the first respondent *vis-à-vis* the SPC decision of 4 March 2013, it is to my mind of no legal effect as that decision is not the first respondent's decision.

I **[15]** It is without doubt that the first respondent's decision to reject the applicant's application to extend the planning permission, application for COW and application in respect of earthworks plan

came later, that is, on 14 May 2013. However, there was no application for leave in respect of the first respondent's decision on 14 May 2013. A

[16] During the hearing of the applicant's substantive application for judicial review on 28 November 2013, the first respondent raised a preliminary objection which is that leave was granted in respect of the SPC decision of 4 March 2013 which is only a recommendation and is in any event not a decision of the first respondent which is the planning authority and as such the wrong decision has been challenged. B C

[17] In this regard the first respondent maintained that leave had been granted in respect of the SPC's decision dated 4 March 2013 whereas the decision of the first respondent dated 14 May 2013 was not the subject of the challenge in the judicial review proceedings. The first respondent took the point that if at all, the challenge should be directed at the first respondent's decision dated 14 May 2013 which, *inter alia*, refused to extend the planning permission and refused approval of COW. D

[18] The point that was made by counsel for the first respondent was that SPC had not made any decision to reject the COW as alleged and that the SPC's decision on 4 March 2013 was merely a recommendation to the first respondent to reject the application. E

[19] Ultimately it was the first respondent's one stop centre ("OSC") at its meeting on 14 May 2013 which decided not to approve the applicant's application for the COW and this was communicated to the applicant by way of letter dated 15 May 2013 (exh. "YTS-3" encl. 15 p. 25). As such, *vis-a-vis* the COW, counsel submitted that the decision to be challenged is the first respondent's decision of 14 May 2013 not to approve the COW and not the second respondent's ("SPC") recommendation of 4 March 2013. F G

[20] However, counsel for the applicant took the position that the SPC's decision and that of the first respondent were "conjoined" and they cannot be looked at in isolation. Hence, as far as the applicant was concerned, it was essentially one decision and that the latter decision of 14 May 2013 of the first respondent was merely an extension of the SPC decision of 4 March 2013. Based on this reasoning, counsel for the applicant said that leave was not necessary in respect of the latter decision H I

of the first respondent dated 14 May 2013. According to counsel, all that was needed was for the applicant to amend the relevant cause papers to present the "train of facts" to show that these decisions were conjoined.

[21] Generally, the starting point in any development is the planning permission which is the main decision and all other approvals are subsidiary to it. Hence, building plans, earthworks or commencement of work etc are all approvals that must be sought but only after planning permission has been obtained. Once planning permission is rejected or expires or is not renewed or extended, then everything else falls as a natural consequence. The latter approvals have no independent existence and are all incidental to the planning permission.

[22] And so, the approval for COW cannot be viewed in isolation and is not a stand-alone decision. Once planning permission is rejected or not extended, as in the present case, then it is that decision that takes centre stage and which should be the target of the application for judicial review.

[23] In this case, the applicant's application for extension of its planning permission was rejected on 14 May 2013 (see "YTS-4" encl. 15 p. 27). Also, the applicant's building plan lapsed on 13 December 2012. Without a valid planning permission and building plan approval, the first respondent cannot allow approval for COW to the applicant. In this regard reference ought to be made to s. 20 of the Town and Country Planning Act 1976 (TCPA 1976) which states that:

> No person shall commence, undertake, or carry out any development otherwise than in conformity with the planning permission granted to him under section 22 in respect of the development or with the conditions of the planning permission.

[24] Hence, planning permission is the key decision/approval which must be extant at all times. However, despite being informed of the rejection of the applicant's application to extend the planning permission by way of letter dated 13 June 2013 (exh. "YTS-4" encl. 15 p. 27), the applicant did not file any application for leave for judicial review to challenge the same.

[25] In a nutshell, the above narrative of facts represents the history of the matter. Leave was granted in respect of SPC's recommendation dated 4 March 2013 and the matter was then

fixed for the substantive hearing. I did not hear parties on the merits of judicial review but only on the threshold issue as to whether the applicant had correctly identified the decision that it seeks to impugn in the judicial review.

[26] Counsel for the first respondent maintained that the applicant had sought and obtained leave in respect of a "recommendation" by the State Government (SPC) that the applicant's application/appeal for COW approval be rejected, whereas the lawful authority to make the decision and did make the decision to reject the application for extension of planning permission and the approval for COW was the first respondent, which is the lawful planning authority under the Town and Country Planning Act 1976. As such, it was contended that leave was obtained in respect of the wrong decision.

Application To Amend

[27] In view of the preliminary objection raised by the first respondent's counsel during the hearing on 28 November 2013, the judicial review proceedings were adjourned as counsel for the applicant indicated that he wished to make an application to amend his judicial review cause papers. He said that he was not conceding to the preliminary objection and that the amendment was being done out of an abundance of caution. Thereafter, the applicant proceeded to file the application to amend the statement pursuant to O. 53 r. 3(2) of the Rules of Court 2012 and the notice of hearing of application (Form 110) for judicial review. The application to amend (encl. 31) was filed on 9 December 2013, which is more than three months from the date when the first respondent's decision dated 14 May 2013 was communicated to the first respondent.

[28] Also it should be noted quite significantly that the amendment is with regards to Form 110 and not Form 109. However, under the Rules of Court 2012, the relief sought for purposes of judicial review are to be stated in Form 109 and not Form 110. As stated earlier, Form 110 only sets out the hearing date for the substantive hearing of the application for judicial review based on leave that was allowed which in turn is based on the reliefs sought in Form 109. Therefore counsel for the first respondent contends that the applicant's attempt to amend Form 110 is flawed and is fatal.

[29] Counsel for the first respondent's starting point was O. 53 r. 3(1) of the Rules of Court 2012 which reads as follows:

> An application under this Order shall not be made unless leave therefore has been granted in accordance with this rule.

[30] Counsel for the first respondent submitted that the applicant only obtained leave on 26 June 2013 (encl. 6) to challenge the purported SPC "recommendation" on 4 March 2013 and is therefore precluded from enlarging its relief by way of the proposed amendment in the said application (encl. 31) to include the decision of the first respondent dated 14 May 2013 rejecting the application for extension of the planning permission and application for commencement of work.

[31] Counsel for the first respondent maintained that leave to challenge the first respondent's decisions dated 14 May 2013 must be made within three months from the date when it was communicated. He referred to O. 53 r. 3(6) of the Rules of Court 2012 which states that:

> An application of judicial review shall be made promptly and in any event within three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant.

[32] Therefore taking the dates when the decision were communicated to the applicant the period for such challenge pursuant to O. 53 r. 3(6) of the Rules of Court 2012 would have expired on 7 September 2013 and 15 September 2013 respectively. As the period had expired in September 2013, the only avenue open to the applicants in the event they wished to challenge the decision of the first respondent on 14 May 2013 refusing to renew the application for planning permission and in refusing to grant the COW to the applicant, is to either file fresh proceedings for judicial review or an application in these proceedings to extend time pursuant to O. 53 r. 3(7) of the Rules of Court 2012 which reads as:

> The Court may, upon the application, extend the time specified in rule 3(6) if it considers that there is a good reason for doing so.

[33] Counsel for the first respondent argued that the application to amend is an attempt to circumvent the requirements set out in O. 53 r. 3 of the Rules of Court 2012 and therefore should not be allowed. In this regard, reference was made to a recent

decision of the Court of Appeal in *Omar Suhaimi Abu Hassan v. Mahkamah Perusahaan Malaysia & Anor* [2014] 3 CLJ 720 (see pp. 12, 16 BA) where in the context of a complete failure to apply for leave for judicial review, the Court of Appeal held:

> [11] We have read the appeal record and the submission of the parties in detail. We are grateful to learned counsel and learned Federal Counsel for the comprehensive submission. After much consideration to the submission of learned counsel for the appellant, we take the view the appeal must be dismissed. Our reasons *inter alia* are as follows:
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> …
>
> (vi) In our view failing to seek a prayer for leave in the originating application in the nature of Form 109 will be fatal unless the applicant has filed an application to amend the originating process for inadvertence within the three months (or extended) period specified in O. 53 r. 3(6) of the Rules of Court 2012 or for some special or exceptional reason the court is prepared to invoke O. 53 r. 3(7) which reads as follows:
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> The Court may, upon an application, extend the time specified in rule 3(6) and if it considers that there is a good reason for doing so.
>
> …
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> [12] In the instant case Form 109 is the originating process as reflected by O. 53 r. 2(1) of the Rules of Court 2012 which, read together with O. 53 r. 3(1) and (2) of the Rules of Court 2012, is to be made *ex parte* to a judge in chambers. Once leave is obtained then the hearing of the substantive prayer can proceed upon filing of Form 110 with the Form 109 as well as all affidavits and the mandatory 'statement' served on the relevant parties, as set out in the rules. The appellant here had not satisfied O. 53 r. 3(2) and had not filed the relevant forms according to rule of procedure and/or practice and has also failed to make any application promptly to condone inadvertence and/or non-compliance.

[34] Hence, based on *Omar Suhaimi*'s case, it was submitted that the applicant can only seek to amend Form 109 in the event it is done within the three months provided by O. 53 r. 3(6) of the Rules of Court 2012.

[35] It was contended that in the present case the application to amend was filed on 9 December 2013, almost three months after the time period had expired and therefore the applicant is precluded from amending either Form 109 or Form 110 to include additional reliefs. It was argued that in any event, Form 110 cannot be amended to include reliefs as Form 110 is only a statutory form to notify parties of the hearing date. If at all Form 109 should be amended.

[36] The Court of Appeal in *Omar Suhaimi*'s case reaffirmed the principle that the failure to comply with O. 53 of the Rules of the High Court 1980 was a fundamental defect that cannot be cured by O. 1A of the then Rules of the High Court 1980. The Court of Appeal approved the statement made by the High Court in *Yick Hoe Ferrous Steel Sdn Bhd v. Tribunal Rayuan Kastam & Ors* [2011] 7 CLJ 544, where in the context of a failure to apply for leave Aziah Ali J (as Her Ladyship then was) had said:

> Order 53 RHC imposed stringent conditions or rules. Failure to comply with the clear provisions of O. 53 RHC was a fundamental defect that was not curable under O. 1A RHC. By commencing this action by way of originating motion, the applicant was evading the mandatory requirements of O. 53 RHC in particular the requirement to first obtain leave. (para 14)
>
> The only reference to an application for leave was in the intitulement. The purpose of the intitulement was to give notice to the other party of the nature of the relief sought in order to avoid the opponent being taken by surprise. However it was not a substitute for a proper pleading for leave. This was to be incorporated in the body of the application itself. (para 16)
>
> The application for judicial review without first obtaining leave was defective, grossly irregular and an abuse of process. The failure to obtain leave resulted in the court lacking jurisdiction to hear the application for judicial review (para 17).

[37] In the present case before me, it was also pointed out that despite clearly being outside the time period prescribed by O. 53 r. 3(6) of the Rules of Court 2012, there is no application to extend time by the applicant *vis-à-vis* the decision of the first respondent dated 14 May 2013.

[38] Counsel for the first respondent referred to the following cases in relation to the need for strict observance of the time-line for filing an application for leave as otherwise the court would not have the requisite jurisdiction to hear the application for judicial review.

(i) *Mersing Omnibus Co Sdn Bhd v. The Minister of Labour & Manpower & Anor* [1983] 2 CLJ 7; [1983] CLJ (Rep) 266; [1983] 2 MLJ 54, where the Federal Court held:

[1] Jurisdiction does not originate in the consent of the parties and cannot be established where it is absent, by such consent or acquiescence.

[2] Leave should not have been granted to the appellant to apply for *certiorari* without the time prescribed in O. 53 r. 1A and neither sought an extension of time nor accounted for the delay to the satisfaction of the learned Judge within its explicit requirements. The learned Judge had no jurisdiction to do so.

(ii) *Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor* [2008] 6 CLJ 805 where the Court of Appeal held:

(3) Taking 8 November 2003 as the latest date the decision was communicated, calculated to 14 February 2005 ie, the date of filing this application for a judicial review there clearly had been inordinate delay in breach of O. 53 r. 3(6) RHC. The appellants had not applied for an extension of time and had not given any explanation for this delay. Compliance with the time frame is fundamental. It goes to the starting point, that of jurisdiction to hear the application. Leave to apply for this judicial review should not therefore have been granted to the appellants since the learned judge had no jurisdiction to allow it in the first place due to the appellants' unaccountable breach of O. 53 r. 3(6) RHC (paras 62, 63, 67 & 71).

(iii) *Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013] 4 CLJ 193, where the Federal Court held:

(5) The principle in *Mersing Omnibus* and *Ravindran* is still good law. Whilst it is true that both *Mersing Omnibus* and *Ravindran* were decided under the old O. 53 r. 1A of the RHC, the principle in relation to an application to extend time to file an application for judicial review remains the same. (para 29)

(6) The time frame in applying for judicial review prescribed by the Rules is fundamental. It goes to jurisdiction and once the trial judge had rejected the explanation for the delay for extension of time to apply for judicial review, the court no longer has the jurisdiction to hear the application for leave for judicial review. Whether the application has merits or not is irrelevant (para 30).

[39] In the present case, counsel for the first respondent emphasised that the decision regarding the non-renewal of the planning permission on 14 May 2013 was communicated to the applicant by way of letter dated 13 June 2013 (see exh. "SM-1" encl. 9). Despite acknowledging receipt of this letter ten days before the hearing of its leave application on 26 June 2013, there was no attempt on the applicant's part to amend encl. 1 (Form 109) to include the challenge on the first respondent's decision not to renew the planning permission.

[40] Hence, it was submitted that the first respondent's decisions of 14 May 2013 were not challenged in the original application for judicial review and cannot now be introduced by way of an amendment to Form 110 and the statement as per the application in encl. 31.

[41] Counsel for the first respondent says that in order to challenge the first respondent's decisions dated 14 May 2013 (which are distinct and separate from the recommendations of the second respondent of 4 March 2013), the applicant ought to have obtained leave and since they are out of the time, they also ought to have applied for extension of time. The failure of the applicant to seek both leave and extension of time is fatal and cannot be cured by this amendment.

[42] Pursuant to the order dated 26 June 2013 (encl. 6), the applicant only obtained leave to challenge the purported decision of the SPC on 4 March 2013 which is merely a recommendation by the SPC to the first respondent. The first respondent's one stop centre met on 14 May 2013 and decided not to allow the applicant's application to extend its planning permission (see exh. "SM-2" encl. 9). Consequently, the first respondent had also decided on 14 May 2013 to reject the applicant's application for COW (see exh. "YTS-3" encl. 15). Both those decisions were communicated to the applicant on 7 June 2013 and 15 June 2013 respectively. Counsel for the first respondent made the point that ten days before the applicant obtained leave on 26 June 2013 (encl. 6) for its application for judicial review, the applicant was already aware of the first respondent's decisions taken on 14 May 2013 and therefore in the event the applicant intended to challenge the decisions dated 14 May 2013, it should have amended encl. 1 (Form 109) and obtained leave accordingly.

[43] It was therefore submitted by the first respondent that the applicant's application to amend Form 110 *via* encl. 31 is an attempt to bypass the express provision of O. 53 r. 3(1) of the Rules of Court 2012 which states:

> An application under this Order shall not be made unless leave therefore has been granted in accordance with this rule.

[44] Thus, it was submitted by counsel for the first respondent that SPC's recommendation dated 4 March 2013 is the wrong decision to be challenged and that the applicant's failure to obtain leave in respect of the first respondent's decisions of 14 May 2013 goes to the jurisdiction of the court to hear the applicant's application for judicial review. However, counsel for the applicant contended that unlike *Omar Suhaimi*'s case, here leave was obtained within time *vis-à-vis* SPC's decision dated 4 March 2013 and that all that is needed is to set out the subsequent decisions of the first respondent which he says constitutes a train of facts. Based on that reasoning, it was submitted that the applicant does not have to obtain leave in respect of the first respondent's decisions or to obtain an extension of time.

Findings And Conclusions

[45] There is no doubt that leave under O. 53 r. 3(1) of the Rules of Court 2012 was granted on 26 June 2013 for judicial review to challenge SPC's recommendation dated 4 March 2013 (rejecting the so-called appeal in respect of COW). Before the leave application came up for hearing, the applicant was already in receipt of the first respondent's decisions dated 14 May 2013;

(i) Confirming that there was no approval for COW,

(ii) Confirming that there would be no extension to the planning permission.

[46] Despite being informed by letter dated 13 June 2013 that the application to extend planning permission has been refused, the applicant did not apply for leave to challenge the decision dated 14 May 2013. Leave was therefore granted only in respect of SPC's recommendation pertaining to a so-called appeal on the issue of COW.

[47] The lawful authority for purposes of planning or rather the proper planning authority under the Town and Country Planning Act 1976 is the first respondent and not the SPC. The latter only

recommended to the first respondent, who would either go along with SPC's recommendation or decide differently. But, the decision maker for planning purposes is the first respondent and it is they who have to defend their decision, if properly challenged by way of judicial review proceedings.

[48] Whether the first respondent acted mechanically on SPC's recommendation or they came to a decision independently is not relevant for present purposes. What is important for present purposes is that the challenge by the applicant must be taken against the proper decision maker and against the proper decision.

[49] In judicial review proceedings, it is absolutely imperative and axiomatic that the impugned decision be properly identified and specifically stated in the application for leave. If the judicial review application is taken against the wrong authority or the wrong decision then invariably the judicial review becomes incompetent.

[50] It is apposite in this regard to refer to the decision of the Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65 where the duty to identify the impugned decision was stated as follows:

> Identifying the Impugned Decision
>
> It is right to say, at the risk of being trite, that administrative law is much concerned with the legality of procedures leading up to a decision and, of course, of the decision itself. *It is therefore a matter of the first importance to correctly identify the decision sought to be impugned*. Furthermore, when the date on which a decision is made is important, it may be necessary to know which of a series of acts constituted the effective decision for the purpose of the scheme in question. The same is true where statute allows an appeal to be brought from a decision. Failure to observe these basic requirements could have fatal consequences as the following authorities will serve to illustrate ... (emphasis added)

[51] Hence, the judicial review application in its original form was clearly in respect of or targeted at SPC's recommendation of 4 March 2013. In my view, that recommendation is not the decision which should be reviewed because it is not a decision made under the auspices of the Town and Country Planning Act 1976. To put it bluntly, SPC's recommendation is only an administrative decision by an organ of the state authority which has no legal effect in so far as the Town and Country Planning

Act 1976 is concerned. As such, in the context of the present case it is the first respondent's decision of 14 May 2013 communicated *via* their letter 13 June 2013 to the applicant that is imperative for purposes of a challenge in judicial review proceedings.

[52] After obtaining leave on 26 June 2013 and after objection was taken by the first respondent, encl. 31 was filed, which according to the applicant is not intended to enlarge the ambit of the leave that was obtained but merely to place the entire "train of facts" pertaining to the decision which are all "conjoined". In my view, whether they are conjoined or not, it is nevertheless imperative to accurately identify the precise decision that is to be challenged. Presently there is no application for leave or extension of time in respect of the first respondent's decisions dated 14 May 2013.

[53] And so encl. 31 does not cure the situation in that leave was only in respect of the SPC's recommendation dated 4 March 2013 which is or may be the precursor to the first respondent's decision of 14 May 2013. Also, encl. 31 is only an application to amend the statement under O. 53 r. 3(2) of the Rules of Court 2012 and Form 110, which is merely the form to be filed after leave has been granted. Form 110 merely serves the purpose of notifying the parties of the hearing date for the substantive judicial review.

[54] If at all I would have thought that Form 109 should have been amended to enlarge the ambit of the leave that was granted to impugn the first respondent's decisions of 14 May 2013 and with an additional prayer for extension of time as the application to amend was made after the three months period *vis-à-vis* the decision of 14 May 2013. It is trite that if the application for leave is out of time, then the court has no jurisdiction, unless time is extended.

[55] In my view, the failure to obtain leave in respect of its challenge against the first respondent's decisions of 14 May 2013 goes to the jurisdiction of the court to hear the applicant's application for judicial review and cannot be established where it is absent by consent or acquiescence (see *Mersing Omnibus Co Sdn Bhd v. The Minister of Labour & Manpower & Anor* [1983] 2 CLJ 7; [1983] CLJ (Rep) 266; [1983] 2 MLJ 54).

[56] Also, in an application for extension of time for leave to apply for judicial review merits are not considered. In *Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013] 4 CLJ 193, the Federal Court held:

> (5) The principle in *Mersing Omnibus* and *Ravindran* is still good law. Whilst it is true that both *Mersing Omnibus* and *Ravindran* were decided under the old O. 53 r. 1A of the RHC, the principle in relation to an application to extend time to file an application for judicial review remains the same (para 29).
>
> (6) The time frame in applying for judicial review prescribed by the Rules is fundamental. It goes to jurisdiction and once the trial judge had rejected the explanation for the delay for extension of time to apply for judicial review, the court no longer has the jurisdiction to hear the application for leave for judicial review. Whether the application has merits or not is irrelevant (para 30).

[57] In the circumstances, I am of the view that the application for amendment (encl. 31) serves no purpose as it does not seek to amend Form 109 nor does it seek leave or extension of time *vis-à-vis* the impugned decision of the first respondent dated 14 May 2013.

[58] As I said, prior to the leave application, the applicant was aware of the first respondent's decision dated 14 May 2013 and could have amended the application for leave and rectified the error and properly pleaded the decision which should be challenged. But that was not done. Even after the preliminary objection was raised by the first respondent, the applicant made no attempt to amend Form 109 and the order for leave coupled with an extension of time.

[59] In the result, regardless of whether the applicant has merits *vis-à-vis* the decision by the first respondent dated 14 May 2013, this court cannot arrogate to itself jurisdiction to review the first respondent's decision as it is not before this court by reason of the fact that leave was not obtained in respect of the first respondent's decisions. In other words, in the absence of leave, the court has no jurisdiction over the first respondent's decisions dated 14 May 2013. As such, encl. 31 would serve no purpose at all and the principle is that wherever an amendment has no

utility then the amendment will be declined. This proposition is to be found in *Ponnusamy & Anor v. Nathu Ram* [1959] 1 LNS 73; [1959] 1 MLJ 228 where it was held that a useless amendment will not be allowed.

[60] In the circumstances, encl. 31 is dismissed. Consequently, the first respondent's counsel took the position that since the proper decision has not been challenged, therefore the judicial review application is incompetent and asked that it be struck off. I decided that I would hear parties before making a decision as to whether, in view of the dismissal of encl. 31, the substantive judicial review application should be dismissed *in limine*.

[61] I therefore fixed the matter for further hearing on 4 August 2014. As for costs of encl. 31, it was agreed that it could be taken up at the end of the judicial review proceedings.

[62] Order accordingly.